RECORD AND BRIEFS

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In The Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY, AND DEPUTY JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION AND CALIFORNIA PEACE OFFICERS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETTTIONERS

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TO THE HONORABLE CHIEF JUSTICE John G. Roberts, Jr. and HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Amici Curiae are the California State Sheriffs' Association, the California Police Chiefs' Association and the California Peace Officers' Association (collectively "*Amici Curiae*").[1] *Amici Curiae* respectfully submit the following brief in support of Petitioners, County of Los Angeles, Christopher Conley and Jennifer Pederson, in accordance with consent to this brief provided by all parties.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

Amici Curiae are the above Associations, whose members make up a vast array of law enforcement officers throughout the State of California. *Amici* Members represent policy making officials, management,

[1] The parties were notified at least ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief and have filed blanket consents for that purpose.

No party or counsel for a party authored this brief, in whole or in part. No person or entity other than *Amici Curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. This representation is made in compliance with Rule 37.6 of the United States Supreme Court Rules.

and rank and file officers, providing a broad spectrum of law enforcement viewpoints.

I. California State Sheriffs' Association

The California State Sheriffs' Association ("CSSA") is a nonprofit professional organization that represents each of the fifty-eight (58) California Sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to allow for the general improvement of law enforcement throughout the State of California.

II. California Police Chiefs' Association

The California Police Chiefs' Association ("CPCA") represents virtually all of the more than 400 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration and crime prevention, by developing and disseminating professional administrative practices for use in the police profession. It also furthers police cooperation and the exchange of information and experience throughout California.

III. California Peace Officers' Association

The California Peace Officers' Association ("CPOA") represents more than 3,000 members, who are peace officers of all ranks, throughout the State of California,

from municipal, county, state, and federal law enforcement agencies. CPOA provides professional development and training for peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

IV. *Amici Curiae* Interests in This Matter

This case raises important issues for *Amici Curiae*, in that it will determine critical issues applicable to officer safety, law enforcement use of force, and the liability of officers for the use of force. Municipalities and Counties represented by the members of *Amici* are interested in the outcome in this matter because it has the potential to negatively impact officer safety and qualified immunity for individual officers for the use of force. Local law enforcement officers are engaged in the primary activity of combating crimes and, frequently, encountering dangerous situations and individuals. Their conduct is guided by this Court's pronouncements and their day-to-day lives in the field are directly impacted by such decisions.

Since *Amici* represent the interests of a wide variety of law enforcement, *Amici* provide this Court with a valuable perspective into the potential adverse effects of the Ninth Circuit opinion in this matter. The underlying use of force principles at issue impact important public safety concerns that are critical at all levels of law enforcement.

Given the significant ramifications of the Ninth Circuit's opinion, *Amici* respectfully submit this brief

in support of Petitioners. *Amici*'s independent perspective on the issues presented by the underlying opinion takes into account, in particular, the fact that the members of *Amici* will be tasked with the actual implementation in the field of the legal principles that this Court will determine in this matter.

SUMMARY OF THE ARGUMENT

This Court has granted review on the following issue pertinent to *Amici*:

> 3. Whether, in an action brought under 42 U.S.C. § 1983, an incident giving rise to a *reasonable* use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment.

STATEMENT OF THE CASE

Amici adopt Petitioners' Statement of the Case, as to the underlying facts in this matter. (Brief for Petitioners ("PB"), at 4). *Amici*, however, wish to emphasize several facts of particular note. Specifically, there is some dispute in the deputies' accounts regarding what information was actually known about individuals residing in the backyard of the property that was being searched for the wanted, felony, parolee. (PB, at 5). Despite the Ninth Circuit's confidence that at least one of

the deputies received information that there were individuals living in the backyard, this does not, in fact, appear to be a settled point. *Mendez v. County of Los Angeles*, 815 F.3d 1178, 1185 (9th Cir. 2016).

At least two other observations were made by deputies during this incident that were both undisputed and which confirmed information known to them about the whereabouts of the wanted, felony parolee. First, there was a bicycle in the front yard of the house they searched. (PB, at 5). The deputies had received a tip from an informant that the parolee had been seen in front of the house on a bicycle. (PB, at 5). Second, when the deputies knocked at the main residence and were talking through the door with the resident, they heard someone running to the back of the house. (PB, at 5-6). Based upon the circumstances and information provided to them, the deputies reasonably believed the person running to the back of the house was the wanted parolee for whom the deputies had an arrest warrant. (PB, at 5-6).

Several deputies entered a side gate and proceeded to the backyard to clear and secure the rear of the residence, for the deputies' safety. (PB, at 5). There, the deputies searched several storage sheds, before opening the makeshift shack in which Respondents were residing. (PB, at 6-7); *Mendez*, 815 F.3d at 1185.

Despite the Ninth Circuit's agreement with the District Court's finding that "deputies here should have been aware that the shack in the backyard was being used as a separate residence," there is nothing

particularly distinctive about the shack, as compared to the other sheds in the backyard, which would reasonably lead to that conclusion. (PB, at 7-8). Indeed, although the Ninth Circuit emphasized that the deputies should have noted that "the shack itself was surrounded by an air conditioning unit," for instance, this unit was "on the opposite side of the shack, and therefore not visible to the Deputies." (PB, at 7); *Mendez*, 815 F.3d at 1193.

NINTH CIRCUIT FINDINGS

The Ninth Circuit determined two primary issues – whether there was an unlawful search of the residence and shack, and whether there was an unlawful entry into the shack. *Mendez*, 815 F.3d at 1187-1188. First, the Ninth Circuit considered whether there has been an unlawful search of the residential premises, including the shack. The deputies had not obtained a search warrant for the premises. However, the deputies argued various exceptions to the warrant requirement – none of which the Ninth Circuit found had any merit. The Ninth Circuit concluded that there was no exigency justifying the search. *Id.* at 1190. The Court further rejected the notion that a protective sweep of the premises was justified here. Instead, the Court found that "[f]or the same reasons that exigent circumstances did not justify entry into the shack, . . . the deputies did not have the requisite suspicion of danger to

justify a protective sweep." *Id.* at 1191. Therefore, according to the Court, the search of the shack by the deputies was a violation of clearly established law. *Id.*

Second as to the deputies' failure to knock and announce before entering the shack, the Court found that the law was *not* clearly established in this regard. *Id.* Specifically, "officers are not required to knock and announce 'at each additional point of entry into structures within the curtilage.'" *Id.* at 1192 (quoting *United States v. Villanueva Magallon*, 43 F. App'x 16 (9th Cir. 2002)). Since officers had already knocked and announced at the main house on the property, before entering the shack, the Court held that it was not clearly established law that deputies would again need to knock and announce at the shack. Although the Court concluded that the deputies here were entitled to qualified immunity on this point, the Court nevertheless held that, prospectively, "officers must knock and re-announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house."[2] *Id.* at 1192-1193.

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[2] Of course, this point seems to be in dispute, as noted in Part III, *supra*. Given the discrepancies about what deputies knew about the shack and whether there were residents therein, and the fact that features of the shack did *not* seem to reasonably reveal to deputies that it was being used as a residence, the Ninth Circuit's conclusion here that the responding deputies should have known the shack was being used as a residence seems inequitable.

ARGUMENT

I. Introduction.

There is no question here that the circumstances of this case are unfortunate for Respondents. As Petitioners aptly state: "It was a tragic happenstance." (PB, at 2). However, law enforcement officers protect the public safety and put themselves in harm's way daily, and must react in the field to very rapidly evolving circumstances; they should not be held liable for unlucky circumstances. This is particularly true, as here, where the Ninth Circuit concluded that officers were entitled, at least in part, to qualified immunity, and that their use of force was expressly found to be *reasonable*.

Amici are particularly concerned that, increasingly, officers are held to a standard that does not honor this Court's demand that officers' actions must *not* be viewed with 20/20 hindsight from the calm safety of a courtroom. It cannot be gainsaid that officers' actions must be viewed through the lens of their viewpoint in the heat of the moment. Given that viewpoint, photographs of the area deputies were attempting to secure and, in particular, their viewpoint of the shack that was being briefly searched reveal that the deputies' reasonable expectation was that the shack was not in fact a dwelling. (Joint Appendix ("JA"), at 76-82). It was merely being cleared as a potential hiding place for the felony parolee, who was considered armed and dangerous, for whom they were searching.

II. Relevant Law.

The Ninth Circuit set forth a standard for the review of use of force by peace officers when there has been an unlawful entry into an individual's residence. In *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), the Ninth Circuit evaluated a claim by officers to qualified immunity for their use of force. In *Alexander*, officers had assisted county health officials in serving an inspection warrant at a home, which ultimately included an order permitting forcible entry. The homeowner's door was nailed shut and he threatened officers that he would use a gun against them at the time of execution of the warrant. *Id.* at 1358. A standoff ensued and officers developed a plan to forcibly break into the home and take the man into custody. When they did so, he pointed a gun at officers and shot twice, although the gun misfired. Officers returned fire, and the homeowner died.

The plaintiff in *Alexander* claimed that the officers "used excessive force in creating the situation which caused [the homeowner] to take the actions he did." *Id.* at 1366. The Court found that the application of qualified immunity turned on the subjective belief of the officers – whether their intent in entering the house was for the unlawful purpose of arresting the homeowner, as opposed to the lawful purpose of keeping the premises safe while health inspectors executed the inspection warrant. *Id.* at 1364.

The Ninth Circuit later characterized its holding in *Alexander* thusly:

> We held that if the police committed an independent Fourth Amendment violation by using unreasonable force to enter the house, then they could be held liable for shooting the man – even though they reasonably shot him at the moment of the shooting – because they "used excessive force in creating the situation which caused [the man] to take the actions he did."

Billington v. Smith, 292 F.3d 1177, 1188 (9th Cir. 2002) (changes in original).

In *Billington*, the Ninth Circuit reconsidered its broader determination in *Alexander*:

> We read *Alexander*, as limited by *Duran*, to hold that where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force. In *Alexander*, the officers allegedly used excessive force because they committed an independent Fourth Amendment violation by entering the man's house to arrest him without an arrest warrant, for a relatively trivial and non-violent offense, and this violation provoked the man to shoot at the officers. Thus, even though the officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force.

Id. at 1189.

In *Duran v. City of Maywood*, the Ninth Circuit characterized the rule in *Alexander* as relating to the situation "when there is evidence that a police officer's use of excessive and unreasonable force caused an *escalation* of events that led to the plaintiff's injury." *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir. 2000) (emphasis added). In *Duran*, "officers walked up the [residential] driveway with guns drawn and never announced their presence." *Id.* at 1131. The plaintiffs in *Duran* argued that this was a "'stealth' approach [which] 'raised the likelihood' that 'whomever they surprised would point a gun at them.'" The court found, however, that the officers had arrived in marked police cars, were in uniform, did have their guns drawn while approaching the residence up the driveway in front of the house, but, ultimately, that "these actions were entirely reasonable given that they were responding to a call that shots had been fired." *Id.*

In light of this evidence, the court concluded that there was "nothing about these actions [that] should have *provoked* an armed response." *Id.* (emphasis added). Indeed, in order for the principle of *Alexander* to apply, the court explicitly noted that "there must be evidence to show that the officer's actions were *excessive* and *unreasonable*, and that these actions caused an *escalation* that led to the shooting." *Id.* (emphasis added).

Most critically, the *Billington* court held that the reasonableness of officers' use of deadly force will depend "on whether their '*reckless or deliberate* conduct during the seizure unreasonably created the need to

use such force,' where such conduct was 'immediately connected to the suspect's threat of force.'" *Id.* at 1186 (emphasis added). Thus, even a "reasonable use of force is unreasonable if the officer *recklessly* got himself into the situation." *Id.* at 1186 (emphasis added).

As limited then, there must be "intentional or reckless conduct rather than mere negligence" in the actions of officers. *Id.* at 1191. A plaintiff cannot merely show that there were "tactical errors" made by law enforcement, i.e., "that no reasonable officer would have used [the officers' tactics]." *Id.* at 1187 (citing *Medina v. Cram*, 252 F.3d 1124 (10th Cir. 2001)). There must, instead, be at least *reckless* conduct on the part of officers in creating the need for the use of force.

Indeed, the court in *Billington* recognized that "the fact than an officer *negligently* gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself." *Id.* at 1190. "[*N*]*egligent* acts do not incur constitutional liability." *Id.* (emphasis added). In other words, "even if an officer negligently provokes a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation." *Id.*

In *Billington*, the court found that force was justified against an individual who was resisting arrest and engaged in hand-to-hand combat with an officer. *Id.* at 1185. However, the man's estate claimed that the officer had made numerous tactical errors which landed him in the situation of being engaged in such combat

with the deceased. *Id.* at 1185-1186. However, the court found that it is insufficient for a party to show merely expert disagreement with an officer's actions. "Rather, the court must decide as a matter of law 'whether a reasonable officer could have believed that his conduct was justified.'" *Id.* at 1189. In *Billington*, the officer's purported failure to wait for backup or take precautions against being compromised in his confrontation with the motorist, among other officer decisions, "could [not] be deemed intentional or reckless, much less unconstitutional, provocations that caused [the motorist] to attack [the officer]." *Id.* at 1191.

This Court previously questioned the validity of "[t]he Ninth Circuit's 'provocation' rule," which it noted "has been sharply questioned elsewhere." *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777, n. 4 (2015) (citing *Livermore v. Lubelan*, 476 F.3d 397, 406-407 (6th Cir. 2007); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2001)). Although this Court noted that its "citation to Ninth Circuit cases should not be read to suggest our agreement (or, for that matter, disagreement) with them," the Court notably still found that, even if this rule were a valid one, there was no need to apply it for purposes of this Court's qualified immunity analysis. *Id.* The only question that mattered to this Court for that analysis was whether there was a clearly established constitutional right that was violated by the officers. *Id.*

In stating the general rule of qualified immunity, this Court reiterated that "[p]ublic officials are immune from suit under 42 U.S.C. § 1983 unless they

have 'violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.'" *Id.* at 1774 (quoting *Plumhoff v. Rickard*, 572 U.S. ___, ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069 (2014)). This Court found that there was no consensus of clearly established law which required officers to accommodate an individual's mental disability.

In *Sheehan*, officers were attempting to assist a social worker to take a mentally unstable woman into temporary protective custody; they entered her residence and shot her because she was wielding a knife. This Court specifically noted that, even "[u]nder Ninth Circuit law, an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction." *Id.* at 1777 (citing *Billington v. Smith*, 292 F.3d 1177, 1189-1190 (9th Cir. 2002)).

The Third Circuit Court of Appeals has recognized that theories of "common law proximate causation" have been applied in the context of claims under 42 U.S.C. § 1983. *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000). In discussing its prior opinion in *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995), the *Watt* court explained that even an "illegal entry did not make the officers automatically liable for any injuries caused by the arrest." *Watt*, 235 F.3d at 160. In "[i]nvoking proximate causation" principles, the Third Circuit "explained that if the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an *intervening cause* that limited the officers' liability." *Id.* In order to

recover damages, a plaintiff would have "to prove two torts – one for the illegal entry and a second for excessive force."

III. There Can Be No Liability for Officers' Use of Force When There is an Intervening Event, and Officers Have Qualified Immunity.

In synthesizing the above legal principles, several key concepts pertinent to the analysis here become clear. First, the "provocation rule" that has been utilized and circumscribed by the Ninth Circuit explicitly requires that there be *intentional* or *reckless* conduct on the part of officers, which conduct provokes a violent reaction or confrontation. Officers' conduct must *escalate* the situation, such that an individual is directly reacting to officers' unlawful or unjustified intrusion.

The facts in this action seem more akin to those in *Duran*, where officers were approaching a house in uniform, but with guns drawn, and were fired upon. The fact that those actions might surprise a resident was insufficient to render them intentionally or recklessly provoking such a reaction.

Moreover, given the totality of the circumstances, one cannot conclude so easily that officers were reckless merely because they did not obtain a warrant. The Ninth Circuit seems to conclude that, because it has determined that officers were required to have a search warrant for the premises, that this means that

the deputies' actions were naturally "reckless." However, given the chain of events – namely the existence of an arrest warrant for a parolee, indicia of his presence at the property, the resident's consent to search the home, the need to secure the rear of the house while it was being searched, the chaotic surroundings of the rear yard, and the very ambiguous nature of the shack that needed to be cleared – all lead to the conclusion that the deputies' actions in briefly opening the shack was not a reckless action for which they can be held liable.

Second, it is notable that the Ninth Circuit surmised that "here an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when officers opened the door. Had this procedure been followed, the Mendezes would not have been shot." *Mendez*, 815 F.3d at 1193. In essence, the Ninth Circuit found, utilizing hindsight 20/20 vision, that it was the deputies' failure to knock and announce which caused the result here. However, the Court found *no* responsibility on the part of the deputies for that failure. The Court found that the deputies were entitled to qualified immunity on that point, since the law was not clearly established that the deputies had to knock and announce separately at a structure apart from the main residence, where they had already knocked and announced.

Finally, the Third Circuit in *Watt* emphasized that even an *illegal* entry does not automatically result in officer liability. Instead, the actions of individuals can

be viewed as an *intervening cause* that limits officer liability. Where by accident, Mr. Mendez was moving his gun at the time that officers peered inside the shack, deputies cannot be held responsible for this unfortunate coincidence.

The Ninth Circuit finds fault in this distinction because an individual who "intentionally pointed a weapon" "would ostensibly be entitled to damages," "but here he would be out of luck because he was merely holding a BB gun and didn't intend to threaten the police." *Mendez*, 815 F.3d at 1194. This apparent incongruity presumes the wrong viewpoint, however. As set forth above, the "provocation rule" is concerned with the officer's conduct; it must be intentional or reckless in creating a situation where those actions *should* have *provoked* an *armed* or *violent* response. Here, there cannot be said to have been any such conduct, or any such response. Instead, the coincidental and unfortunate actions of Mr. Mendez in the shack, which was not a response directly provoked by the officers here, must instead be viewed by this Court as an intervening event which limits officer liability, not supports it. Any other result simply opens officers up to mere negligence or standard tort liability, and undermines the qualified immunity principles that protect officers reacting reasonably in the field to rapidly evolving, dangerous situations.

IV. The Ninth Circuit's Opinion Jeopardizes Officer Safety.

From *Amici*'s perspective, however, and more important than the officer liability repercussions of the Ninth Circuit's holding below, are the negative officer safety implications of the Ninth Circuit's decision. The decision below further erodes this Court's prior determination in the seminal case of *Graham v. Connor*, 490 U.S. 386 (1989), that an officer's actions must be judged by a court through the viewpoint of a reasonable officer involved in the particular incident and without the benefit of the 20/20 vision of hindsight. The Ninth Circuit's opinion will have the inexorable effect of causing officers involved in rapidly evolving and dangerous circumstances to second guess each action they are about to take leading up to an encounter with a suspect, for fear of subjecting themselves to potentially devastating financial liability. With second guessing comes hesitation. Hesitation, in turn, could lead to tragic, life-ending results for a law enforcement officer who is confronted, as here, by an individual who appears to be armed with a firearm and pointing that weapon directly at the officer.

This Court has recognized on numerous occasions that law enforcement officers must be able to act in their roles as protectors of the public safety with some degree of latitude. Officers' actions need not be perfect, but they must be reasonable under the totality of the circumstances confronting them when they determine that they must use force to protect themselves, citizens

at large or to take a person into custody at the time they utilize that force.

This principle has been embedded in Fourth Amendment jurisprudence since *Graham v. Connor*. The Ninth Circuit's decision here impermissibly undermines that notion and, instead, places law enforcement officers in the position of focusing on the details leading up to the instant when they are compelled to utilize force for a legitimate law enforcement purpose. In other words, the Ninth Circuit's application of its provocation doctrine forces officers to focus their attention on matters that, quite frankly, could get them killed or seriously injured rather than on the circumstances immediately confronting them.

The facts of this case amply illustrate the impossible choice to which the deputies were put under the provocation doctrine. On the one hand, they faced the Scylla of being shot by the apparently armed and threatening Mr. Mendez when they peered inside the shack in which it was later determined Mr. Mendez resided. On the other hand, they faced the Charybdis of substantial legal liability for their actions in failing to knock and announce their presence at the entry of a structure that could have been nothing more than another storage shed in the backyard of a residence where they had already obtained permission to search. In either event, law enforcement loses when placed in the untenable position of decision making while serving the public under the Ninth Circuit's provocation doctrine.

CONCLUSION

Amici contend that officers must be permitted to use reasonable force in protecting themselves, even when they may make errors in the execution of their duties. Qualified immunity protects officers as to such reasonable use of force.

As the Ninth Circuit found here, the force used by the involved deputies was reasonable. Indisputably, they were staring down the barrel of a gun inside a shack that did not reflect, on the outside, its use as a dwelling. The coincidental actions of Mr. Mendez in moving the gun toward the deputies at the time they looked into the shack must be found to be an intervening act that precludes a finding of liability against the deputies.

For all of the foregoing reasons, *Amici* urge this Court to reject the provocation doctrine articulated by the Ninth Circuit because it does not comply with settled Fourth Amendment jurisprudence and significantly impairs officer safety.

Dated: January 24, 2017

Respectfully submitted,

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